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No. 02-

IN THE

Supreme Court of the United States

STEPHEN AUBREY MCININCH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the term "damage by means of fire" in 18 U.S.C. § 844(i) requires charring, or actual burning, of property used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce in order for someone to be convicted under the statute.

PARTIES TO THE PROCEEDING

The parties to the proceeding are identified in the caption of the case.

Stephen Aubrey McIninch is the petitioner.

United States of America is the respondent.

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Stephen Aubrey McIninch (McIninch) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit (App. A) was issued on June 3, 2002. The oral decision on McIninch's Motion for Judgment of Acquittal pursuant to Rule 29, Fed. R. Crim. P. (App. B) was rendered on November 27, 2001. It is also unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals was issued on June 3, 2002.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 844(i), provides in pertinent part, as follows:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; . . . .

STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW

McInnch was indicted by a federal grand jury on three counts of allegedly violating 18 U.S.C. § 844(i) (JA 13-14)[1], the basis on which jurisdiction in the district court was invoked. He was convicted on Counts One and Three, but acquitted as to Count Two. This petition only involves the conviction on Count One.

Count One of the Indictment (JA 13) charged the following:

> That on or about June 28, 2000, in the Western Judicial District of Virginia, STEPHEN AUBREY McININCH, maliciously damaged or attempted to damage, by means of fire, a building or other real property located at the Pebble Creek Apartments, 3312-B Circlebrook Drive, Roanoke, Virginia, said building was used in interstate commerce or in any activity affecting interstate commerce.

After the government rested, McInnch moved for judgments of acquittal as to all counts in the indictment (JA 346-354). McInnch argued with respect to Count One that the government failed to prove any damage by means of fire because no part of the building at Pebble Creek Apartments actually burned and there was no evidence he specifically intended to damage the building. The district court overruled McInnch's motions (JA 353-354).

1. "JA ___" refers to the Joint Appendix filed in the United States Court of Appeals.

The jury found McIninch guilty on this count and another that also involved setting fire to door mats. He was acquitted of a third, more serious fire. Pursuant to Rule 29(c), Fed. R. Crim. P., McIninch filed a Motion for Judgment of Acquittal or, in the Alternative, for Arrest of Judgment (JA 434-447). He argued again that the government had failed to prove damage by means of fire at Pebble Creek. Though the district court agreed there was no proof McIninch specifically intended to damage the building, it orally overruled the motion (App. 4a-7a), entered judgment and sentenced McIninch to a total of 63 months confinement and a fine of $2,000.00 (JA 464-471).

McIninch timely appealed his convictions to the United States Court of Appeals for the Fourth Circuit (JA 463). Without hearing oral argument, the court of appeals affirmed McIninch's convictions in a three paragraph unpublished per curiam opinion (App. 1a-3a). The court never specifically addressed McIninch's damage by means of fire argument. Rather, the court simply stated that:

> A reviewing court must uphold a jury's verdict if the evidence, when viewed in the light most favorable to the Government, is sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 80 (1942). We have reviewed the record and are satisfied that substantial evidence supports McIninch's convictions (App. 2a).

B. THE FACTS ON WHICH McININCH'S CONVICTION WAS BASED

The fire on which McIninch was convicted in Count One of the Indictment (JA 13) took place on June 28, 2000, at the Pebble Creek Apartments in Roanoke County, Virginia (JA 32). It was stipulated the Pebble Creek Apartments were used in interstate commerce or in an activity affecting interstate commerce (JA 87).

Volunteer Fire Chief David Kilbane responded to this fire (JA 32). He arrived before the first truck (JA 33) and described the scene this way:

> When I arrived at the front of the apartment building, the apartment building, it's a three-story building with four units on each level, the bottom level being four or five feet below grade. When I arrived there was a young lady sitting on the front steps going to the building. She told me that someone had lit the doormat on fire, her boyfriend had put it out and was giving chase out the back door of the complex.
>
> So I went up the steps and went down to the lower level and saw where a doormat in front of Unit B had been burnt, and there was some dry chemical extinguisher powder on the floor. (JA 33).

When Kilbane arrived, the fire was already out (JA 35). As part of his responsibility he filled out a fire incident report (JA 430). Therein, Kilbane listed the estimated loss as zero dollars (JA 37, 430). Moreover, while Kilbane testified at

trial this was a default setting on the computer, neither he nor the investigator ever went back and changed the zero dollar figure (JA 36-37). On the other hand, Kilbane did later add some additional times in the upper right-hand corner of the report (JA 37).

Roanoke County Police Officer Christopher Reynolds also investigated the fire. McInnch told him he had been having problems with vandalism (JA 42-43). That night McInnch and his girlfriend were watching for possible suspects (JA 42-43). McInnch's girlfriend was in the parking lot and McInnch was inside the apartment (JA 42-43). McInnch described to Reynolds the following scenario:

> He said he was inside the apartment and he saw a light outside his front door, which turned out to be a fire. He went back inside. The whole front of his door area was on fire. He went back inside with the fire extinguisher and extinguished the fire. He then saw the suspects in the parking lot and proceeded in a foot pursuit. (JA 43).

McInnch and his girlfriend also described what happened that night. Because of his complaints of repeated vandalism to his apartment, McInnch had already received permission to move from Pebble Creek (JA 366-367). His girlfriend had suggested they stake out the apartment in an effort to catch the vandals (JA 82). The apartment was dark the entire time (JA 83). They used walkie talkies to communicate (JA 74). The stakeout lasted about two hours (JA 369).

According to McInnich, the following occurred:

> I had just got out of the bathroom and I heard the knock on the door. I had asked if that was Jennifer and said that the door was open, if that was her. She said it was not, she was still in the car, so I thought that kind of strange. And so at that time I thought that that might have been the person or persons that had been breaking into my house and vandalizing it.
>
> As I approached the door I saw some flickering light, and when I opened the door I saw that there was a small fire on my welcome mat (JA 370).

McInnich stated that the fire was on the right quadrant of the mat (JA 370-371; 416-429). He was not aware of anything else being on fire (JA 371). He then ran into his kitchen, grabbed a fire extinguisher and put the fire out (JA 371).

Assistant Fire Marshall Rodney Ferguson arrived at the scene almost an hour after the fire had been reported (JA 105). Asked to describe what he saw, Ferguson testified, as follows:

> The area near the door had a rug there, you could make out it, that was somewhat charred and consumed. Just beyond on the — if you're looking towards the apartment door, just to the left, the wood framing of the door, that had some char down at the base of the floor. (JA 106-107, 429).

The government then asked Ferguson to define "charring," which he did, as follows:

> Q What does the word "charring" mean in plain English?
>
> A It is the blackening or the appearance of a normal combustible material from the release of atoms or the changing of its chemical composition through heat.
>
> Q I don't know if that's normal English. Does it mean that it's burned or blackened?
>
> A It's blackened due to heat affected, yes, sir, or placed to it. (JA 107).

Ferguson never took a sample of the wood to determine whether it was actually damaged (JA 143). He did not even rub his finger on it to determine whether it was actually burned (JA 143), which he said it was not. In fact, what Ferguson described was sooting, not charring. Charring is burning, not blackening. First Lieutenant Edward Fielder, lead investigator for arson investigations for the City of Roanoke, (JA 251), testified for the government about the fire in which McInnch was acquitted. In so doing, he referred to sooting. When McInnch cross-examined him, Fielder stated the following:

> Q . . . And you also made reference to, and I don't actually have the photograph itself, but made reference to sooting?
>
> A Yes, sir.

Q And that's actually blackening by heat, isn't it?

A Blackening by heat or smoke.

Q And that's the definition of sooting?

A Yes, sir, basically. (JA 268).

Ferguson believed McInnich set the fire and then put it out. He testified that a liquid had been sprayed on the burned mat and all over the hallway (JA 109). He stated that the splatter pattern went away from the apartment door (JA 110).

In an attempt to confirm his findings, Ferguson conducted an experiment that was videotaped and shown to the jury. Significantly, during the experiment, Ferguson attempted to ignite the fuel he sprayed on a floor that was constructed to match the floor of the apartment hallway (JA 137). As he stated, "[w]hen I touched the match down into the fuel, because this is a combustible fuel, the match almost went out. I had to bring it back out of the liquid to allow the match to burn again." (JA 137). Ferguson also attempted to recreate the burn patterns he found at Pebble Creek by lighting a doormat and extinguishing it within a few seconds (JA 137-138).

Susan Hubbard was a property manager at Pebble Creek Apartments (JA 86). Hubbard was not at the fire scene that night and could not testify about damage caused by the fire (JA 90). However, she stated that after the fire she saw charring on the door frame, (JA 90, 426), which she referred to as "minimal." (JA 88). This so-called charring was taken care of in-house (JA 89).

McIninch denied that he set this or any fire (JA 363, 389). He also claimed his girlfriend and he had been the victims of numerous acts of vandalism (JA 364-368). The government theorized, however, that McIninch had actually committed the vandalism acts about which he complained, including this fire.

REASONS FOR GRANTING THE WRIT

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED, BUT SHOULD BE SETTLED, BY THIS COURT

In order for McIninch to be guilty of a federal crime, he must have maliciously damaged or attempted to damage by means of fire the building at Pebble Creek. 18 U.S.C. § 844(i). In this case, the government failed to prove damage by means of fire. Because the district court also found there was no evidence from which a jury could reasonably conclude McIninch had attempted to damage this building by means of fire (JA 454), he should have been acquitted of this charge or the court of appeals should have reversed his conviction.

When it orally overruled McIninch's motion for judgment of acquittal (App. 4a-7a), the district court quoted from *United States v. Gullett*, 75 F.3d 941, 947 (4th Cir. 1996), and stated as follows:

> In *U.S v. Gullett*, the Fourth Circuit stated that, "If congress uses a common-law term in a federal criminal statute without defining it, we must presume that congress adopted the common-law definition of that term. Second, we will not adopt the common-law meaning of the term if there are

> grounds for inferring any affirmative instruction from congress to define it otherwise." I believe, based upon my reading of the statute, that there is some instruction from congress to define it otherwise in the expressed language of the statute itself. (App. 4a-5a).

Continuing, the district court agreed that "[i]n terms of the burning requirement, under the common-law definition there must be some damage to the fiber of the wood or other combustible material. That is ordinarily met in common law if there is some charring." (App. 5a). However, the district court also noted that in many jurisdictions the common law definition of arson has been broadened by statute (App. 5a), and held as follows:

> I hit that analysis in viewing this particular statute. The statute does not use the common law words in "burn." It says specifically "whoever maliciously damages, destroys, or attempts to damage or destroy, by means of fire." It is therefore my conclusion that less than burning meets the definition of the statute under Section 844(i). (App. 6a).[2]

Accordingly, the district court held that in the light most favorable to the United States, a jury could find that McInnch maliciously damaged the building by means of fire (App. 7a). In so holding, the district court placed its own liberal definition on the phrase "damage by means of fire"

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2. The district court sought guidance for its determination from a 1986 Missouri Law Review article entitled "The Metamorphosis of the Law of Arson," 51 Mo. L. Rev. 295 (1986) (App. 5a).

instead of following the common law. There is no difference between "burn" and "damage by means of fire," nor was any difference intended.

The court of appeals obviously agreed (App. 1a-3a). Though it never specifically addressed the question of what is required for "damage by means of fire," the court affirmed Mcininch's conviction. It reviewed the record and was satisfied "that substantial evidence supports McIninch's convictions." (App. 2a).

There are no reported cases addressing the question what must the government show to prove "damage by means of fire." The legislative history of 18 U.S.C. § 844(i), however, contradicts the holding in McIninch's case. Originally, Congress thought proof that the subject property was substantially damaged or destroyed by means of fire should be required for conviction. H.R. Rep. No. 97-678 at 3 (1982). This requirement was deleted, however, because it would be "too difficult to establish." *Id.* Nevertheless, it appears Congress never intended that fires set to door mats which leave soot on the property but do not actually burn it would be a federal crime.

This Court echoed Congress' sentiment when it stated that "[a]rson is a paradigmatic common-law state crime." *Jones v. United States*, 529 U.S. 848, 858 (2000). "It is appropriate to avoid the constitutional question that arises when § 844(i) is read to render traditionally local criminal conduct a matter of federal enforcement." *Id. See also United States v. Lopez*, 514 U.S. 549 (1995). Moreover, when terms used in a statute are not defined, courts are to give those terms their ordinary meaning. *Jones v. United States*, 529 U.S. at 855.

"Damage by means of fire," though cumbersome, means damage by burning. If other damage that can occur in a fire, like smoke or water damage, were to be included in the statute Congress would have used words such as "damage from fire" or "damage caused by fire." It did not do so. Rather, it used a narrow approach that leads to the interpretation this Court has placed on § 844(i). *Jones v. United States*, *supra*. The ordinary meaning of "damage by means of fire" is actual fire damage.

Here, there was evidence of sooting on the door frame of McIninch's door. It makes no difference that Ferguson and Hubbard called what they saw charring. They described soot, which is simply blackening by heat or smoke. There was never any evidence of actual burning of real property.

Since arson is a paradigmatic common-law state crime, and since the phrase "damage by means of fire" is not defined in 18 U.S.C. § 844(i), it is appropriate to look to common law for guidance as to its meaning. *Braxton v. United States*, 500 U.S. 344, 351 (1991). The Virginia Court of Appeals offers a good example. *Hancock v. Commonwealth*, 12 Va. App. 774, 407 S.E.2d 301 (1991).

In *Hancock*, the defendant was convicted of arson. On appeal he argued there had been no burning to sustain the conviction. The Virginia Court of Appeals defined what was necessary for there to be arson, as follows:

> "The amount of 'burning' necessary to be shown is any amount, provided there is a perceptible wasting of the fiber of the building or the object which is the subject of arson, or some part of the building or object, by fire." 2A Michie's

> Jurisprudence, Arson § 1 (1981). While no Virginia case has directly addressed the proposition, we follow the precedent set by a majority of other states which hold that only a slight burning is necessary. 12 Va. App. at 779, 407 S.E.2d at 303-304.

In ordinary usage, therefore, the term "damage by means of fire" means "burn," no matter how slight. "Burn" means there is a perceptible wasting of fiber. Under this definition, only a door mat was burned at Pebble Creek Apartments, not the building. That crime amounts to a Virginia law misdemeanor, Va. Code Ann. § 18.2-81, not a federal crime warranting five years in prison.

It would have been helpful if the court of appeals had specifically addressed this important question that apparently has never been settled by any federal court. Its failure to do so, however, does not diminish the need for this Court to instruct lower courts as to what the government must show in order to prove "damage by means of fire" under 18 U.S.C. § 844(i). The liberal interpretation placed on the term by the lower courts in this case goes far beyond the common law that Congress and this Court intended be applied to prosecutions under the statute, and thereby rendered in this case traditionally local criminal conduct a matter of federal enforcement. *Jones v. United States*, 529 U.S. at 858.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JUNE 3, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-4962

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN AUBREY MCININCH,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Samuel G. Wilson, Chief District Judge. (CR-01-20)

Submitted: April 25, 2002

Decided: June 3, 2002

Before LUTTIG, WILLIAMS, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Appendix A

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Stephen Aubrey McIninch was found guilty following a jury trial of two counts of maliciously damaging, or attempting to damage, by means of a fire, a building used in or affecting interstate commerce, in violation of 18 U.S.C.A. § 844(i) (West 2000). Finding no reversible error, we affirm.

On appeal, McIninch first contends that the district court erred in denying his motions for a judgment of acquittal on both counts. A reviewing court must uphold a jury's verdict if the evidence, when viewed in the light most favorable to the Government, is sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 80 (1942). We have reviewed the record and are satisfied that substantial evidence supports McIninch's convictions.

McIninch also claims that the district court abused its discretion in admitting a videotape recreation of a fire occurring at Pebble Creek apartments. Recognizing the potential prejudicial effects of such recreations, we have "established a requirement that video taped evidence purporting to recreate events at issue must be substantially similar to the actual events to be admissible." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir.1996). McIninch

contends that the videotape was not substantially similar to the actual event because the light used to simulate the fire was not flickering and the apartment lights were on during the taping. Even assuming, without deciding, that the district court abused its discretion in admitting the videotape, we find that any resulting error was harmless given the overwhelming evidence against McIninch presented at trial. *See Talkington v. Atria Reclamelucifers Fabrieken BV*, 152 F.3d 254, 266 (4th Cir.1998) (finding that any resulting error from district court's decision to admit a videotape of a burn test in a products liability case was harmless).

Accordingly, we affirm McIninch's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — EXCERPTS OF DECISION DATED NOVEMBER 27, 2001

* * *

[449] THE COURT: No. Thank you.

Let me just state that 18 U.S.C. Section 844(i) provides that "whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce," and then it provides "shall be imprisoned for not less than 5 and not more than 20 years, fined under this title, or both." The elements of federal arson are — there are four of them. It has to be done maliciously; there has to be damage as defined by the statute, under the statute; (3) by means of a fire; and (4) a building used in interstate commerce.

In a case of an attempt under that provision, there has [450] to be an attempt to damage, by means of a fire, a building in interstate commerce. And the question that's first raised here is: When congress used the term "damage by means of fire," did it mean to incorporate parts of the common-law definition of arson, burning, and, specifically, must there be a charring? That's one of the questions that's been put to me. That question of whether there is in fact a charring may not be pivotal, of course, if there is an attempt. It doesn't have to be a charring clearly under those circumstances.

In *U.S. v. Gullett*, the Fourth Circuit stated that, "If congress uses a common-law term in a federal criminal statute without defining it, we must presume that congress adopted the common-law definition of that term. Second,

we will not adopt the common-law meaning of the term if there are grounds for inferring any affirmative instruction from congress to define it otherwise." I believe, based upon my reading of the statute, that there is some instruction from congress to define it otherwise in the expressed language of the statute itself.

Common-law arson, of course, requires the malicious burning — of course, common-law arson, the malicious burning of the dwelling of another. There was, of course, in common law an additional element of the nighttime. I think that was probably also an element of common-law arson. In terms of the burning requirement, under the common-law definition there [451] must be some damage to the fiber of the wood or other combustible material. That is ordinarily met in common law if there is some charring.

There are a number of statutes. In fact, how those statutes come into play have been discussed in an article called *Metamorphosis of the Law of Arson*, which is found in a Missouri Law Review book. And in that particular article, the author makes the point that, and I'm quoting from him, "During the modern metamorphosis of arson into a complex crime protecting against both human and property risk, both the traditional phrase 'sets fire to or burns' and the common-law's 'burning' requirement have been abandoned in all but the above 15 states." And it lists various states as of 1986 in which it had been abandoned.

"The majority of the remaining American states, 23 in number, the statutes have replaced 'sets fire to or burns,' or simply 'burns,' with 'damages,' or sometimes 'damages or

destroys,' by means of fire. Under these statutes, the actor must cause some physical harm to the subject matter of the crime by the use of fire, or to put it in more operational terms, the fire must cause some change (injury) to the building which lowers its value or impairs its usefulness. Thus, it is arson under the damage statutes if the fire 'scorches' the paint on the building, or causes smoke damage to the building, although neither would suffice as a burning [452] at common law."

Again I continue to quote. "Of course, any burning at common law would constitute damage under the damage statutes as well. The principle effect of these damage statutes then is to extend arson liability to those rather infrequent situations in which there is some actual injury to the building which is caused by the fire but there is no 'burning.' Thus, in our hypothetical situation in which the culprit lights a fire (by burning items of personal property) but no portion of the building is burned, there would be guilt of arson under one of these damage statutes only if some actual physical injury was caused to the building (i.e., smoke damage). If there was no such 'injury' or 'damage' to the building, there would be no arson. The culprit's liability would be for attempted arson in one of these states."

I hit that analysis in viewing this particular statute. The statute does not use the common law words in "burn." It says specifically "whoever maliciously damages, destroys, or attempts to damage or destroy, by means of fire." It is therefore my conclusion that less than burning meets the definition of the statute under Section 844(i).

Appendix B

In the Pebble Creek fire, the fire marshals testified that the area near the door was somewhat charred and consumed. Again, I quote, "The wood framing of the door had some char down at the base of the floor. Charring means blackened due [453] to heat, and sooty means blackened by heat or smoke." These are various matters to which the fire marshal testified. Of course those, that is at least the charring itself, would have been sufficient under the definition of common law.

Now, in reviewing the evidence, it is my responsibility to review the evidence at this stage, since the defendant has had the benefit of having a jury determine his guilt beyond a reasonable doubt. Once that is done, he has had the presumption of innocence. It is then up to this court, in determining whether or not a Rule 29 motion is in order, to construe the evidence in the light most favorable to the government.

In the light most favorable to the United States, the Court concludes that (1) as to the Pebble Creek fire, there is sufficient evidence from which a jury could have concluded that the defendant maliciously damaged the building by fire. Again, there's also evidence, even using the common-law definition as to the Pebble Creek fire, that there was some charring of the building. And, again, that is in the light most favorable to the United States.